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IN THE

Supreme Court of the United States

October Term, 1967

No. 765

RUSSEL MILTON WILLS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

RUSSEL MILTON WILLS, *Petitioner,* v. UNITED STATES OF AMERICA, *Respondent.*	No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the October 3, 1967, judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case.

CITATIONS TO OPINIONS BELOW

Honorable William T. Beeks, United States District Judge, United States District Court for the Western District of Washington, Northern Division, gave a memorandum decision, unreported, on September 23, 1966, denying petitioner's motion to dismiss and finding petitioner guilty as charged. This opinion is printed in the Appendix hereto, App. A-11.[1] The opinion of the United States Court of Appeals is printed at App. A-2; it has not yet appeared in the Official Federal Reporter.

JURISDICTION

The judgment of the United States Court of Appeals

1. "App. . . ." refers to the Appendix hereto.

for the Ninth Circuit was entered on October 3, 1967, App. A-1. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (I).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the action of Local Selective Service Board No. 47 in declaring petitioner a delinquent for "destroying his registration certificate" was beyond the jurisdiction of the Board and therefore invalid such that the I-A Classification and Order to Report for Induction following upon that declaration of delinquency were also void and invalid.

2. Assuming that such action by Local Selective Service Board No. 47 was within its jurisdiction, whether making petitioner a delinquent for "destroying his registration certificate" and so classifying him I-A was an unconstitutional abridgement of petitioner's freedom of expression because the conduct sought to be punished was a peaceful act of symbolic speech.

3. Whether making petitioner a delinquent for "destroying his registration certificate" and classifying him I-A in reliance upon the August 30, 1965, amendment to Section 12 (b)(3) of the Universal Military Training and Service Act, 50 U.S.C. App. §462 (b)(3) was invalid and void because the statute on its face and as so applied is an unconstitutional abridgement of petitioner's freedom of expression, in that the conduct which the Act and the Selective Service Board sought to punish was a peaceful act of symbolic speech.

4. Assuming the conclusion of law of the Circuit Court of Appeals that "Destruction is, in fact, no more than a willful and defiant refusal to possess", and that "the two

offenses are in truth but one", whether as so applied 50 U.S.C. App. §462 (b)(6), implemented by 32 C.F.R. 1617.1, requiring registrant to "have in his personal possession at all times his Registration Certificate", are an unconstitutional abridgement of petitioner's freedom of expression, because the conduct sought to be punished was and is a peaceful act of symbolic speech.

5. Whether 50 U.S.C. App. §462 (b)(3), which makes it a felony to knowingly destroy or knowingly mutilate a Selective Service Certificate, serves any legitimate purpose in the administration of the Selective Service System, or has any other rational legislative purpose, and whether, in the absence of any legitimate or rational legislative purpose, the statute is an unconstitutional deprivation of petitioner's individual liberty without due process of law, in violation of the Fifth Amendment.

6. Whether 50 U.S.C. App. § 462 (b)(6), implemented by 32 C.F.R. 1617.1, requiring registrant to "have in his personal possession at all times his Registration Certificate" serves any legitimate purpose in the administration of the Selective Service System, or has any other rational legislative purpose, and whether, in the absence of any legitimate or rational legislative purpose, on its face and as applied to the facts of this case, the statute is an unconstitutional deprivation of petitioner's individual liberty without due process of law, in violation of the Fifth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the First and Fifth Amendments to the United States Constitution.

(1) *First Amendment*:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

(2) *Fifth Amendment*:

"No person shall be held to answer to a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. A statute involved is 50 U.S.C. App. §462 (a):

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [§§ 451, 453, 454, 455, 456 and 458-571 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title [said sections], . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said sections] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

3. Another statute involved is P.L. 89-152, 79 Stat. 586, enacted August 30, 1965, which adds certain language to Section 12 (b)(3) of the Act (as hereafter underscored), 50 U.S.C. App. §462 (b)(3), and 50 U.S.C. App. §462 (b)(6), as follows:

> "(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title (sections 451-454, 455-471 of this Appendix); or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title (said sections), or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title (said sections) or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate

for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury."

4. The Regulation involved is 32 C.F.R. §1617.1 as follows:

"§1617.1 *Effect of failure to have unaltered registration certificate in personal possession.*

"Every person required to present himself for and submit to registration must, after he is registered, have in his personal possession at all times his Registration Certificate (SSS Form No. 2) prepared by his local board which has not been altered and on which no notation duly and validly inscribed thereon has been changed in any manner after its preparation by the local board. The failure of any person to have his Registration Certificate (SSS Form No. 2) in his personal possession shall be *prima facie* evidence of his failure to register. . . ."

STATEMENT OF THE CASE

Petitioner was indicted July 27, 1966, in the United States District Court for the Western District of Washington, Northern Division, for a violation of 50 U.S.C. App. §462 (a), and 32 C.F.R. 1632.14, in that on or about February 24, 1966, at Seattle, Washington, he did knowingly, willfully and unlawfully fail, neglect and refuse to perform a duty required of him by the Universal Military Training and Service Act, and the rules, regulations and directions made pursuant thereto, in that, having been duly and regularly ordered by a local Selective Service Board to report and submit to induction into the Armed Forces of the United States of America, he failed, neglected and refused to be inducted.

On October 15, 1965, petitioner, a married student with a II-S Selective Service Classification, wrote a letter to his draft board in Berkeley, California; the letter was

received by that draft board on October 19, 1965. The letter reads:

> "This is to inform your office that 1, I have intentionally destroyed my draft card and will henceforth refuse to carry another. 2, I have signed the C.N.V.A. petition, with which I am sure you are familiar. 3, I will refuse to cooperate with your office in any manner whatsoever. If you wish to take any measures against me, you can contact me at the following address . . .
>
> "My reasons for these actions are purely patriotic. They may be found in the Declaration of Independence, The U. S. Constitution, and the Nurenburg Judgment. I won't bore you with details since I presume that you have heard them often. History will judge both of us, and one will be declared an unintentional murderer. It will not be me."

On October 21, 1965, petitioner's local draft board declared petitioner to be a delinquent, inserting in his selective service cover sheet as the reason for its action, "destroyed reg. card"; on October 23, 1965, Selective Service Form 110 was mailed to petitioner advising him that he had been classified I-A. No reason for the I-A classification was given to petitioner. Petitioner did not request a personal appearance before his local board, or take an appeal of the I-A classification.

On January 3, 1966, petitioner was mailed Selective Service Form 304, Delinquency Notice, which was dated October 21, 1965, and which advised petitioner:

> 1. "You are hereby notified that this Local Board has declared you to be a delinquent because of your failure to perform the following duty or duties required of you under the selective service law:
>
> Destroyed his registration certificate.
>
> 2. "You are hereby directed to report to this Local

Board immediately, either in person or by mail.

3. "Your willful failure to perform the foregoing duty or duties is a violation of the Universal Military Training and Service Act, which is punishable by imprisonment for as much as 5 years or a fine of as much as $10,000.00, or by both such fine and imprisonment."

On January 31, 1966, petitioner was ordered to report for induction in Seattle, Washington, and on February 24, 1966, petitioner refused induction. The indictment followed. Petitioner pleaded not guilty and waived a jury trial. After hearing, and after a timely motion to dismiss the indictment, Honorable William T. Beeks denied petitioner's motion to dismiss, adjudged petitioner to be guilty, and sentenced him to five years imprisonment. App. A-9. The judgment and opinion of the Ninth Circuit Court of Appeals rendered October 3, 1967, affirmed the judgment of conviction. App. A-2.

REASONS FOR GRANTING WRIT

Certiorari should be granted because the Court of Appeals erroneously avoided a consideration of the constitionality of 50 U.S.C. App. §462 (b)(3) which makes it a felony to knowingly destroy or knowingly mutilate a Selective Service Certificate. Also erroneously avoided by the Court of Appeals was a consideration of the effect of that statute when applied by petitioner's draft board to make petitioner a delinquent for his peaceful and protesting act of destroying his Registration Certificate. These are important questions of federal law which have not been, but should be, settled by this court.

I.

The Court of Appeals erroneously avoided consideration of 50 U.S.C. App. §462 (b)(3), and its effect on

petitioner's constitutional rights by concluding that petitioner's act of destruction was included in, and encompassed by 50 U.S.C. App. §462 (b)(6) which, implemented by 32 C.F.R. 1617.1, requires registrant to "have in his personal possession at all times his Registration Certificate". Having concluded that destruction is equivalent to or results in a lack of personal possession by a registrant, the Court of Appeals then refused to consider the constitutionality of 50 U.S.C. App. §462 (b)(3) even though petitioner's local selective service board had declared him a delinquent for the stated reason, "Destroyed his registration certificates," and the Court of Appeals further refused to consider the constitutionality of 50 U.S.C. App. §462 (b) (6) as applied by it to petitioner.

II.

Subsequent to the decision of the Court of Appeals for the Ninth Circuit in *Wills v. United States*, this court granted certiorari in No. 232, *U. S. v. O'Brien*, and in No. 233, *O'Brien v. U. S.*, to consider two questions:

> 1. "Does First Amendment protect Selective Service Registrant from conviction under 50 U.S.C. App. 462 (b)(3) for burning his draft card?" (No. 232, 1967-1968 Term, *U. S. v. O'Brien*, 36 L.W. 3125).
>
> 2. "Was Selective Service registrant deprived of due process when, court of appeals reversed his conviction under 50 U.S.C. App. 462 (b)(3) for burning his draft card, but held that he stood convicted under 462 (b)(6) for failing to keep draft card in his possession, an offense of which he had not been charged or tried?" (No. 233, 1967-1968 Term, *O'Brien v. U. S.*, 36 L.W. 3126).

Whether or not this court upholds 50 U.S.C. App. §462 (b)(3) in the face of a First Amendment challenge, and whether or not a conviction of O'Brien under 50

U.S.C. App. §462 (b)(6) be allowed to stand, in the circumstances disclosed in *O'Brien v. U. S.*, No. 233, there are important related questions of federal law in the instant case which have not been, but should be settled by this Court. These related questions of federal law hereafter set forth are current, affect thousands of selective service registrants, and have pertinence to the present operation of the Selective Service System; the answers to the following questions of federal law will influence, limit, and define the freedom of selective service registrants to peacefully protest against the war in Viet Nam, against the draft law, and perhaps other objects of protest.

A. If 50 U.S.C. App. §462 (b)(3) be held constitutional in *U. S. v. O'Brien*, No. 232, there remains the question discussed and resolved by the Second Circuit Court of Appeals in *Wolff v. U. S.*, 372 F.2d 817 (C.A. 2, 1967): Can Selective Service Board No. 47 apply that statute to a registrant if no regulation affecting the Selective Service System authorizes a draft board to declare a registrant a delinquent or to reclassify him for destroying his registration certificate?

B. If 50 U.S.C. App. §462 (b)(3) be held unconstitutional in *U. S. v. O'Brien*, No. 232, can a Selective Service Board nevertheless make a registrant delinquent for a claimed violation of that statute?

C. If this court holds in *O'Brien v. U. S.*, No. 233, that the registrant was deprived of due process when the Court of Appeals reversed his conviction under 50 U.S.C. App. §462 (b)(3) for burning his draft card, yet held that he stood convicted under 50 U.S.C. App. §462 (b)(6) for

failure to keep his draft card in his possession, then it must follow that a draft board cannot give a reason for delinquency based on 50 U.S.C. App. §462 (b)(3), and be supported in its declaration of delinquency upon the unexpressed reason of failure to possess his Selective Service Certificate, grounded *sub silentio* upon 50 U.S.C. App. §462 (b)(6).

D. Even if this court holds the procedure of the Court of Appeals not to be violative of O'Brien's right to due process, a Selective Service Board, untrained in the law, acting without benefit of a hearing or trial for a registrant, not guided by a criminal standard of proof, should not be able to assert delinquency because registrant destroyed his Selective Service Certificate, only to be supported in its administrative decision by a reviewing court treating a failure to possess as an "included offense" within the stated reason for delinquency, that of destruction of a Selective Service Certificate.

III.

All questions presented by this case raise the issue of petitioner's right to rely upon the First Amendment in his peaceful act of symbolic speech, in his writings explaining the symbolic act of destroying his Selective Service Card, and in communicating his protest directly to his local draft board.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

KENNETH A. MACDONALD
DAVID R. HOOD
Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RUSSEL MILTON WILLS, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 21378

APPEAL from the United States District Court for the Western District of Washington, Northern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Northern Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered October 3, 1967.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RUSSEL MILTON WILLS, *Appellant*; vs. UNITED STATES OF AMERICA, *Appellee.*	No. 21378

[October 3, 1967]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Before: CHAMBERS, MERRILL and KOELSCH, Circuit Judges

MERRILL, Circuit Judge:

Appellant stands convicted of refusal to submit to induction into the Armed Forces in violation of 50 U.S.C. App. §462 and 32 C.F.R. §1632.14. He has taken this appeal from judgment.

The basis of his refusal to be inducted was his contention that he was classified I-A and summoned for induction because of his action in destroying his draft card as a protest against the Government's policies and actions with respect to Vietnam, and that his classification into I-A was void as a violation of his constitutional right to freedom of speech.

On October 15, 1965, appellant, a full-time student with a II-S deferment, wrote the following letter to his local draft board in Berkeley, California:

"This is to inform your office that 1, I have intentionally destroyed my draft card and will henceforth refuse to carry another. 2, I have signed the C.N.V.A. petition, with which I am sure you are familiar. 3, I will refuse to co-operate with your office in any manner whatsoever. If you wish to take any measures against me, you can contact me at the following address. . . .

"My reasons for these actions are purely patriotic. They may be found in the Declaration of Independence, The U.S. Constitution and the Nurenburg Judgment. I won't bore you with details since I presume that you have heard them often. History will judge both of us, and one will be declared an unintentional murderer. It will not be me."

On October 23, 1965, appellant was notified by his local board that he had been reclassified I-A. No reason for reclassification was given, although the notice advised him of his right to a personal appearance and to an appeal, and also stated: "FOR INFORMATION AND ADVICE GO TO ANY LOCAL BOARD." Appellant did not request a personal appearance or take an appeal. On January 31, 1966, he was ordered to report for induction. On February 24, 1966, he refused induction.

I. *Exhaustion of Administrative Remedies*

At the outset we are faced with the contention of the Government that appellant is foreclosed from attacking his reclassification here by reason of his failure to exhaust administrative remedies through the taking of an appeal within the Selective Service System. Such was the holding of the District Court. Although we affirm the judgment of conviction, we disagree with the District Court on the foregoing point.

In the first place, appellant's objection to his classifi-

cation was not addressed to the area of administrative judgment. It did not pose a question upon which courts, bowing to special expertise, would regard the administrative determination as final, save only where basis in fact is lacking. His objection, founded upon a claim of Constitutional right, was one on which courts have little reason to defer to administrative determination. The exhaustion rule loses much of its force in this area. *Cf. Wolff v. Selective Service Local Board No.* 16, 372 F.2d 817, 825 (2d Cir. 1967).

Further, the notice received by appellant on October 23 did not tell the whole story. In reclassifying him I-A, the local board had first proceeded (on October 21), pursuant to its regulations, 32 C.F.R. §1642.4, to declare appellant a "delinquent" for failure to perform duties required of him by the Selective Service Law. This section provides that when a registrant is declared to be a delinquent the board shall mail him a delinquency notice, setting forth the duty he has failed to perform.

The board finally did mail appellant a notice of delinquency (dated October 21, 1965) on January 3, 1966. Notice thus was not received until long after the ten-day period for appeal from reclassification had expired. Appeal does not lie from a declaration of delinquency, but only from the reclassification that follows.

The District Court recognized that the reclassification was not in accordance with the procedure contemplated by the regulations. It stated, however:

> "The requirement [of notice] is to inform the defendant of the acts which resulted in his being declared delinquent and will result in his being I-A."

It found that defendant "knew full well why he was reclassified," and was in no way prejudiced by failure to receive his delinquency notice prior to reclassification.

We quite agree that appellant knew full well why he was being classified I-A. What he did not know was that this classification was based upon a declaration of delinquency. A "delinquency-I-A" status is substantially different from that of an ordinary I-A. Unless otherwise requested by the United States Attorney (§1642.13), the board must call I-A delinquents for induction before all others, even before volunteers (§1631.7). Notice of delinquency is, in substance, a preinduction notice.

As the District Court noted, appellant "was intentionally challenging his draft board to act," but he did not know, in time to preserve (through administrative appeal) his right to assert his constitutional claim, what course that action would take. Failure to give notice of delinquency prior to reclassification may have led appellant to believe that the board or the Government would respond to his challenge otherwise than by immediate induction; by imposing a criminal sanction, in response to which his constitutional claim might be asserted and under which administrative appeal would have been irrelevant.[1] Knowledge of his delinquency status and im-

1. Following receipt of his induction notice appellant sought conscientious-objector classification. This request was duly denied and no issue in this respect is presented here. In his letter seeking reclassification, however, appellant makes statements relevant to our problem. He wrote:

> "As I saw it, two courses of action were then open to you. First, you could prosecute me under civil [*sic*] law for refusal to carry a draft card; I am thinking of the recently passed law imposing a $10,000 fine and/or a sentence of five years in jail, which, hopefully, will be eventually judged unconstitutional under Article Eight of the Amendments to the Constitution of the United States of America. Your second possible line of action, as I saw it, would be to induct me."

pending induction would thus be relevant to appellant's decision whether to appeal, and the board's failure to disclose this fact at the proper time cannot be said to be without consequence to that decision.

Under the circumstances we reject the Government's contention that appellant is barred from attacking his reclassification through failure to exhaust administrative remedies.

II. *Validity of the Board's Action*

A. Appellant first attacks his reclassification as invalid for the reason we have already discussed, that it was contrary to regulations because it preceded the sending of a delinquency notice, relying in part on *Knox v. United States*, 200 F.2d 398 (9th Cir. 1952).

It is true that because of the very limited scope of judicial review of Selective Service decisions, see *Estep v. United States*, 327 U.S. 114 (1946), and the potential severity of the sanctions involved, courts have been particularly sensitive to procedural irregularities and possible abuses by local boards. We recognized in *Knox*, however, that irregularities or omissions which do not result in prejudice to the registrant are to be disregarded. 200 F.2d at 401.

We find no prejudice in the present context. The only consequence, as we have noted above, was that appellant lost the opportunity to secure administrative review of his constitutional claim. We cure that by entertaining the claim here. Thus we conclude that the board's omission was not such as to invalidate the reclassification.

B. We proceed then to appellant's basic contention:

that the act of destroying his draft card was protected symbolic speech of protest; that he has a constitutional right to protest; that reclassification and induction as a sanction against protest cannot be permitted to stand.

The draft board, however, took action not because appellant acted in protest but because his form of protest constituted an act of willful disobedience of the board's requirement that at all times he retain his draft card in his possession. 32 C.F.R. §1617.1.

Appellant clearly would have been subject to declaration of delinquency under 32 C.F.R. §1642.4 and reclassification under §1642.12 for this violation. He insists, however, that it was for the destruction and not for failure to possess that the board acted. He points to the fact that the duty he was charged with failure to perform (as set forth in the board's tardy notice of delinquency) was "Destroyed his Registration Certificate." He refers us to Operations Bulletin No. 282, National Headquarters of the Selective Service System, which advised local boards of Public Law 89-152, amending §12(b)(3) of the Universal Military Training and Service Act, 50 U.S.C. App. §462(b)(3), to make it a criminal offense to knowingly mutilate or destroy a registration certificate. This bulletin advised local boards that when such violations are brought to their attention they should consider whether the registrant-violators should be declared delinquent and their inductions accelerated.

It is against Public Law 89-152 and its legislative history that appellant's principal attack is directed.[2] But

2 Appellant would have us declare that Act an unconstitutional violation of free speech. He relies on *O'Brien v. United States*, 376 F.2d 538 (1st Cir. 1967), where it was stated:

"In singling out persons engaged in protest for special treatment the

Congress' preoccupation with card-burning, which appellant finds offensive, simply does not concern us here. It does not carry over from the legislative halls to infect and render equivocal action by an entirely independent body. Though Congress may have sought to distinguish them, the two offenses are in truth but one. Destruction is, in fact, no more than a willful and defiant refusal to possess. The card burners know this full well. The act of public destruction of a draft card would not have its dramatic impact as protest were it not also a demonstration of disobedience of the duty to possess and carry that card, for which the protestor is subject to punishment. Appellant in his letter to the board recognized that the two offenses are in fact one so far as the board is concerned. He wrote: "I have intentionally destroyed my draft card and will henceforth refuse to carry another." It was in response to this advice that the board acted.

We conclude that the reclassification and order to report for induction did not violate appellant's constitutional rights.

Affirmed.

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amendment strikes at the very core of what the First Amendment protects." *Id.* at 541.

But while *O'Brien* held the Act unconstitutional in purporting to impose special treatment on protestors, it recognized that draft-card destruction also constitutes a violation of the requirement to possess and is criminal in that respect. The court was concerned lest, in imposing sentence, the District Court may have been led into regarding destruction as a more serious violation warranting the imposition of greater penal sanctions. The case was remanded for reconsideration of sentence. The determination of guilt was not disturbed.

We do not reach the question of the Act's constitutionality. Appellant was not prosecuted under it. Accepting, arguendo, the *O'Brien* result, we are not here faced with the degrees of severity available to a sentencing court. The question here is not whether the board may impose a more severe sanction for destruction than for nondestructive refusal to possess, but whether it may impose the same sanction, a declaration of delinquency.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

RUSSEL MILTON WILLS,
Defendant.

No. 51150

On this 23rd day of September, 1966 came the attorney for the government and the defendant appeared in person and by retained counsel, Kenneth A. MacDonald, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty, and a finding of guilty by the Court of the offense of violation of Title 50 U.S.C. App., Sec. 462 as charged in the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged in the Indictment, and as to said charge is convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS, commencing this date, in such institution as the Attorney General of the United States or his authorized representative may by law designate.

The Court recommends that the defendant not be con-

sidered eligible for parole until such time as he has served at least TWO (2) YEARS of this sentence.

The Court's Memorandum Decision, filed on this date, is by reference incorporated herein as the Court's Findings of Fact and Conclusions of Law.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

WM. T. BEEKS, *United States District Judge.*

DATED: September 23, 1966.

Presented by:

MICHAEL J. SWOFFORD, *Asst. U.S. Attorney.*

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. RUSSEL MILTON WILLS, *Defendant.*	No. 51150 MEMORANDUM DECISION

Russel Milton Wills, defendant, refused to be inducted into the armed forces of the United States on February 24, 1966, and has been charged with violation of Title 50, U.S.C.A., App. §462(a).

The Selective Service file on this individual contains a record of the events that led Wills to be ordered to report for induction. Wills so reported but refused to be inducted.

The essential events from his record follow.

On October 15, 1965, defendant wrote his local board that he had destroyed his draft card (a felony, 50 U.S.C.A., App. §462(b)(3)), would refuse to carry another, and would not further cooperate with the board. Defendant also told the board where to contact him if they wanted to take any action against him.

On October 21, 1965, the defendant's draft board declared him a delinquent pursuant to Selective Service regulation 32 C.F.R. 1642.4, but the local board did not at that time mail a notice of delinquency to the defendant.

On October 23, 1965, the local board reclassified the

defendant from II-S to I-A pursuant to Selective Service regulation 32 C.F.R. 1642.12 and mailed notice of this reclassification to the defendant.

On January 3, 1966, the local board mailed the notice of delinquency to the defendant. This notice was dated October 21, 1965.

On January 31, 1966, the defendant was ordered to report for induction.

On February 24, 1966, the defendant refused to be inducted and signed a statement so stating.

Wills argues that he was denied due process of law by the failure of his local board to mail him the notice of delinquency prior to reclassifying him I-A. He correctly argues that Selective Service regulation 32 C.F.R. 1642.10 required his local board to declare him a delinquent in accordance with the provisions of Selective Service regulation 32 C.F.R. 1642.4. He then argues that Selective Service regulation 32 C.F.R. 1642.4 requires his local board to take three actions prior to reclassifying him I-A: (1) Enter a record of the delinquency action in his file; (2) complete a delinquency notice in duplicate setting forth the duty he failed to perform; and (3) mail the original of the notice to him.

Admittedly the local board failed to mail the delinquency notice to Wills until about two and one-half months after the board had reclassified him I-A. The defendant argues that the I-A classification was improper and violated due process of law and thus the order to report for induction was invalid and that he is not guilty of refusing to be inducted as charged.

It is the opinion of this court that while Wills' local board technically erred in not mailing the delinquency notice prior to reclassifying him I-A, such error does not invalidate the I-A classification and subsequent order to report for induction.

Selective Service regulation 32 C.F.R. 1642.4 requires the delinquency notice mailed to the registrant to set forth the duty the registrant has failed to perform. The requirement is to inform the defendant of the acts which resulted in his being declared a delinquent and will result in his being classified I-A. The registrant is also directed to communicate with his local board immediately. Such delinquency notice would be important when the registrant had unknowingly failed to perform a required duty or when third party information given to the board alleged the registrant had so failed to perform his duties.

But that is not the situation with respect to defendant Wills. Wills wrote his draft board that by his own voluntary and intentional act he had destroyed his draft card. He also told them where to reach him for whatever action they desired to take. There is no way he could have been misled when he received notice of reclassification classifying him I-A postmarked a week after he mailed his letter to his draft board.

Accordingly, the court concludes that Wills was in no way prejudiced by the failure of his board to mail him the notice of delinquency since he had by his own act caused his reclassification to I-A. "Procedural irregularities or omissions which do not result in prejudice to the registrant are to be disregarded." *Knox v. United States*, 200 F.2d 398, 401 (9th Cir. 1952).

Even if Wills initially was prejudiced by the failure of his board to send him the delinquency notice he subsequently failed to exhaust his administrative remedies. The notice of classification mailed to him on October 23, 1965, advised him of his right to appear personally before his board, or to request an appeal directly to the appeal board, or to go to any local board for advice. The defendant did not take any of these actions to determine the reason for or to challenge the reclassification. He knew full well why he was reclassified. The text of his October 15, 1965 letter to his draft board reads, "If you wish to take any measures against me you can contact me at the following address. . . ." This language plus the fact he destroyed his draft card indicates that Wills was intentionally challenging his draft board to act.

Evans v. United States, 252 F.2d 509, 511 (9th Cir. 1958), followed *Falbo v. United States*, 320 U.S. 549, 88 L.Ed. 305 (1944) (and other cases) in applying the exhaustion of administrative remedies rule. In *Evans* the court held that when the jurisdiction of the local board is in doubt the failure to appeal would bar a judicial attack on the local board's classification. The court went on to hold that even where the registrant claims lack of due process in the board's classification procedure he is not relieved from asserting his administrative appeal remedies.

This court holds that any error made by Wills' draft board in not mailing the delinquency notice to Wills before classifying him I-A was cured by his failure to take any of the administrative appeal remedies available to him.

Since the failure to appeal cured any possible defect

in the I-A classification, Wills' board had jurisdiction to order him for induction.

Wills, having wilfully refused induction, is guilty as charged.

Dated this 23rd day of September, 1966.

WM. T. BEEKS, *United States District Judge*

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 765

RUSSEL MILTON WILLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial, petitioner was convicted in the United States District Court for the Western District of Washington, for refusal to submit to induction into the Armed Forces in violation of 50 U.S.C. App. 462 and 32 C.F.R. 1632.14. He was sentenced to five years' imprisonment, to be eligible for parole only after he had served two years of the sentence. The court of appeals affirmed (Pet. App. 2–8).

1. The pertinent facts are not in dispute.[1] On Octo-

[1] Petitioner's Selective Service file (Gov't Exh. 1), which contains a full record of the administrative proceedings and was part of the record before the court of appeals, is being lodged with the Clerk of this Court.

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ber 15, 1965, petitioner, who was then classified 2–S, sent a letter to his local board in Berkeley, California, advising that he had "intentionally destroyed" his draft card, that he would "henceforth refuse to carry another" or cooperate with the local board "in any manner whatsoever," and that he was taking these actions for "purely patriotic" reasons (Pet. App. 3). On October 21, 1965, petitioner was declared a delinquent, pursuant to 32 C.F.R. 1642.4,[2] and reclassified 1–A under 32 C.F.R. 1642.12 (Pet. App. 11–12). An entry was made on his Selective Service cover sheet that he had "Destroyed reg. card" (Pet. App. 7). On October 23, he was notified of such reclassification, with no reason being assigned therefor (Pet. App. 12).[3] This notice advised him of his right to a personal appearance before the local board, his right to seek information and advice from any local board, and his right to appeal his 1–A classification. After some postponements, petitioner was notified to report for induction on February 24, 1966. He appeared at the induction center as ordered but refused to submit to induction (Pet. App. 12).

2. Petitioner argues that the notation by the local board when it declared him a delinquent—"[d]estroyed his registration certificate"—indicates that he

[2] This regulation provides in pertinent part: "Whenever a registrant has failed to perform any duty * * * required of him under the selective service law * * * the local board may declare him to be a delinquent."

[3] The notice of delinquency (dated October 21, 1965) was not mailed to petitioner until January 3, 1966 (Pet. App. 4). It stated that the basis of the board's order was that he had "[d]estroyed his registration certificate" (Pet. App. 7).

was declared delinquent for destroying his draft card in violation of the 1965 amendment to Section 12(b)(3) of the Universal Military Training and Service Act (50 U.S.C. App. 462(b)(3), 79 Stat. 586), which punishes the knowing destruction or mutilation of Selective Service certificates. He thus argues that his case will be governed by the ruling in *United States* v. *O'Brien*, No. 232, this Term, in which the issue is the constitutionality of that statute.[4]

The draft-card burning statute is not, however, involved here. The Selective Service regulations define a delinquent as "a person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law" (32 C.F.R. 1602.4; see also 32 C.F.R. 1642.4(a)). The regulations further provide that registrants found to be delinquent may be reclassified 1–A (32 C.F.R. 1642.12, 1642.13). The authority to declare petitioner a delinquent therefore could properly rest on petitioner's violation of the regulation requiring that he retain his registration certificate "in his personal possession at all times" (32 C.F.R. 1617.1).[5] Here the draft board did not indicate that it was proceeding under the statute either in the

[4] Certiorari was granted in No. 232 on October 9, 1967; O'Brien's cross-petition (No. 233, this Term), raising a related question which the Court need reach only if the 1965 amendment is held unconstitutional, was likewise granted.

[5] It has been held that a local board has authority to reclassify a registrant as delinquent only where the registrant failed to comply with an affirmative duty created by a specific administrative regulation. See *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817, 821–822 (C.A. 2).

delinquency notice that it sent to petitioner, or in the entry as to delinquency that it made in petitioner's Selective Service file; it simply noted that his classification was being changed because he had destroyed his draft card. In the same letter in which petitioner notified his local board that he had destroyed his certificate, he stated that he would "henceforth refuse to carry another." His violation of the affirmative duty under the regulations to keep the card in his personal possession was thus clear. However his conceded non-possession came about, that situation justified his being declared a delinquent; his delinquency, in turn, authorized his reclassification.

This interpretation of the administrative action does not inject into the case an issue comparable to the one raised by the First Circuit's ruling in *O'Brien* which is challenged in No. 233, this Term. There, even though the court of appeals held the statutory provision relating to destruction unconstitutional, it affirmed O'Brien's conviction on the theory that the evidence necessarily established a violation of the "possession" regulation. The question raised is whether, on that basis, the defendant was sufficiently informed of the criminal charges against him. In this case, however, petitioner was never charged with the criminal offense either of draft-card burning or of non-possession. The only criminal charge against him was the failure to report for induction after being ordered to do so; that was the crime of which he was convicted, and he is necessarily limited here to seeking review of the Ninth Circuit's affirmance of that conviction.

Hence, the imprecise wording by the draft board of the reason for petitioner's treatment as a delinquent

did not result in any uncertainty in the indictment. Petitioner had made clear that he had not only destroyed his card but would not carry another. The fact that the draft board made a notation that he destroyed his card rather than that he refused to carry it in no way affected his conduct before or after indictment.[6] He was at all times aware of the charges against him and was in no way prejudiced in framing his defense.[7] As the court of appeals pointed out, at least as to the validity of petitioner's reclassification, "Destruction is, in fact, no more than a willful and defiant refusal to possess" (Pet. App. 8).

Petitioner's reference (Pet. 10) to *Wolff* v. *United States*, 372 F. 2d 817 (C.A. 2), deserves mention. There, the Second Circuit concluded that "it is not the function of local boards in the Selective Service System to punish these registrants by reclassifying them I–A because they protested * * * the Government's involvement in Vietnam" (*id.* at 822). In the instant case, however, petitioner was reclassified because of his failure to comply with pertinent Selective Service

[6] Nor was the tardy sending of a notice of petitioner's being declared a delinquent in any way prejudicial to petitioner, except perhaps as to whether he had properly exhausted his administrative remedies in challenging the propriety of his reclassification, and on that point the court of appeals ruled in petitioner's favor (see Pet. App. 3–6).

[7] While petitioner poses, as a question presented, the validity under the First Amendment of the possession regulation (Pet. 3), he does not seriously argue the issue. The regulation was adopted long before the protest activity in which petitioner engaged. We know of no court which has found the regulation to be invalid. See, *e.g. United States* v. *Kime*, 188 F. 2d 677 (C.A. 7), certiorari denied 342 U.S. 823; *O'Brien* v. *United States*, 376 F. 2d 538, 540–541 (C.A. 1).

regulations, which required him to carry his draft card, and not because of any protest activity as such. Thus, the situation here differs significantly from that involved in *Wolff*. We recognize that whether an administrative reclassification amounts to a penalty might in some circumstances present a substantial question. But petitioner has made no such contention, either in this Court or in the courts below. And since that question has neither been raised nor developed on the record, this would appear an inappropriate case in which to consider it.

It is therefore respectfully submitted that there is no need to defer action on this petition pending a ruling in *O'Brien* and that the petition for a writ of certiorari should be denied.

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SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1967

No. 765

RUSSEL MILTON WILLS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

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RUSSEL MILTON WILLS, *Petitioner,* v. UNITED STATES OF AMERICA, *Respondent.*	No. 765

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

The petitioner prays for a rehearing of the order of the court entered on June 10, 1968, denying his petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

This petition is based upon intervening circumstances of substantial effect, in particular the decison of the court in *United States v. O'Brien,* 36 U.S.L.W. 4469 (1968), and the decision of the court to grant certiorari in *Oestereich v. Selective Service Local Board No.* 11, No. 1246, October Term, 1967. Both of these decisions substantially alter the grounds upon which a petition for writ of certiorari in *Wills v. United States,* No. 765, October Term, 1967, should be based. This petition is also based upon other substantial

questions of federal law, which were not raised in the petition for certiorari but are available to petitioner, and which are pertinent to the present operation of the Selective Service System and affect thousands of Selective Service registrants.

SUMMARY

Petitioner was indicted and convicted under Title 50 U.S.C. App. §462(a) for refusing induction into the Armed Forces of the United States. It is not disputed that petitioner did so refuse induction, and if Local Board No. 47's induction order was valid, petitioner's conviction must stand. However, if that order was invalid, either because the Board under the circumstances lacked the power to issue it or because the exercise of its power deprived petitioner of constitutional rights, then petitioner cannot be punished for refusing to heed it. *Thornhill v. Alabama,* 310 U.S. 88 (1940); *Thomas v. Collins,* 323 U.S. 516 (1945).

Local Board No. 47 issued the induction order because petitioner's classification was "I-A delinquent," which put him that the top of the order of call. 32 C.F.R. §1642.12. The Local Board had reclassified petitioner from II-S to I-A under the regulation permitting reclassification of a delinquent registrant. 32 C.F.R. §1642.12. As no other change of circumstances appears in the record, petitioner's reclassification was based solely upon his delinquent status. Assuming that this reclassification from II-S to I-A was within the Board's discretion, the validity of petitioner's induction order is directly dependent upon the validity of the Local Board's act in declaring petitioner delinquent.

Selective Service regulations permit a Local Board to declare a registrant delinquent only when the registrant "has failed to perform any duty . . . required of him under the Selective Service law . . . ." 32 C.F.R. §1642.4 (a). And such duty must be an affirmative one created by a specific administrative regulation. See *Wolff v. Selective Service Local Board No. 16,* 372 F.2d 817 (C.A.2d Cir. 1967). Two questions are therefore raised with respect to the Local Board's act in declaring petitioner delinquent. Did petitioner breach an affirmative Selective Service duty such that the Local Board, acting pursuant to 32 C.F.R. §1642.4(a), could declare him delinquent? If so, is the delinquency regulation so vague and overbroad as to impinge upon petitioner's constitutional rights?

Regulation 1617.1 creates an affirmative duty of a registrant "to have in his personal possession at all times his Registration Certificate . . . ." 32 C.F.R. §1617.1. The Court of Appeals found that the Board declared petitioner a delinquent for breach of this duty: ". . . his form of protest constituted an act of willful disobedience of the board's requirement that at all times he retain his draft card in his possession." *Wills v. United States,* 384 F.2d 943, 946 (C.A. 9th Cir. 1967). The Government contends that "(t)he authority to declare petitioner a delinquent . . . *could* properly rest on petitioner's violation of . . . 32 C.F.R. §1617.1." Memorandum for the United States in Opposition to the Petition for a Writ of Certiorari, p. 3 (emphasis added). But we urge that the Board acted upon petitioner's words of protest against the Vietnam war and the draft, not upon conduct, and that the Board's action therefore violated

his constitutional rights to free speech (POINT I) and to petition the Government for a redress of grievances (POINT II).

Even if the Board could act on the basis of the statements in petitioner's letter than he was in violation of the possession regulation, and in fact acted solely on the basis of those statements, and not upon petitioner's expression of unpopular and dissident views, a question arises as to whether the possession requirement, 32 C.F.R. §1617.1, is the kind of "duty" which, if not performed, can be the basis for punitive use of the delinquency procedures (POINT III).

If the writing of a letter to a Local Board protesting the Vietnam war and the draft, and stating that the registrant cannot conscientiously continue to cooperate with the possession regulation, can be the basis for punitive use of the delinquency regulation, then that regulation is unconstitutionally vague and overbroad (POINT IV).

REASONS FOR GRANTING THE PETITION

I

A question is presented as to whether the action of Local Board No. 47 in declaring petitioner a delinquent, classifying him I-A, and ordering him to report for induction, after the Board received a letter of protest from him, violated his federal constitutional right to free speech. This is a question which was not raised in the petition for certiorari, and is of a substantial nature.

Local Board No. 47 can act only under authority from Congress. The power of Congress to limit speech is strictly constrained by the First Amendment. While the right to free speech is not absolute, *Chaplinsky v. New Hamp-*

shire, 315 U.S. 568 (1942), Congress may limit speech by legislation only (1) where "words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils Congress has a right to prevent," *Schenck v. United States,* 249 U.S. 47 (1919), or (2) where the governmental interest in regulating speech is compelling and paramount in relation to the individual's interest in expression. *Communist Party v. Subversive Activities Control Board,* 351 U.S. 115 (1956); *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963).

A. Petitioner's Expression Cannot Be Limited Under the Clear and Present Danger Test:

Petitioner's letter to his Local Board created no "clear and present danger" of any "substantive evil" such that Congress could empower the Board to punish that expression. "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Bridges v. California,* 314 U.S. 252, 263 (1941). Petitioner chose an entirely peaceful method of expressing his views, a method which neither incited lawlessness on the part of others nor obstructed the operation of the Selective Service System, and the clear and present danger test does not apply. Even the public burning of a draft card does not meet the clear and present danger test. *United States v. O'Brien,* 36 U.S.L.W. 4469 (1968).

B. Petitioner's Expression Cannot Be Limited Under the Balancing Test:

The balancing test as applied to the instant case compels the conclusion that our society loses more in free

speech than it gains in Selective Service administration by permitting Local Board No. 47 to punish petitioner for writing his protest letter. Petitioner's interest in expressing his protest was strong. He had deep and sincere reasons for opposing the Vietnam war and the peacetime draft, both subjects of great national importance and concern. Petitioner was limited in the means by which he could register a satisfying and effective protest against the war and the draft: he controlled no news media and lacked the resources to advertise or circulate pamphlets. We urge that the countervailing governmental interest in prohibiting the writing of such letters as the Board received from petitioner is not sufficiently compelling to override petitioner's vital interest in freedom of expression.

The court recently held that "Congress has a legitimate and substantial interest in preventing [the] wanton and unrestrained destruction [of Selective Service certificates] and assuring their continuing availability by punishing people who knowingly and wilfully destroy or mutilate them." *United States v. O'Brien*, 36 U.S.L.W. 4469, 4473 (1968). But the court was careful to narrowly limit the scope of that governmental interest: "The 1965 Amendment [to Title 50 U.S.C. App. §462(b)(3)] prohibits such conduct [i.e. knowing and wilful destruction of Selective Service certificates] and does nothing more. In other words, both the governmental interest and the operation of the 1965 Amendment are *limited to the noncommunicative aspect* of O'Brien's conduct." *United States v. O'Brien, supra*, at p. 4473 (emphasis added). There was no "noncommunicative aspect" to petitioner's conduct, since that conduct was restricted to writing a

letter to his Local Board. Petitioner's conduct was a communicative exercise of pure free speech which cannot be suppressed, under the *O'Brien* rule, by a governmental interest in prohibiting the writing of protest letters to a Local Board.

"The state may defend its existence and its functions, not against words or argument or criticism, however vigorous or ill-advised, but against *action*. . . ." Justice Fortas, *Concerning Dissent and Civil Disobedience*, Signet Books (1968), p. 23. The fact that petitioner's letter contained intemperate and perhaps ill-advised statements regarding alleged conduct should not remove the protections of the First Amendment from what was the expression of political protest. The Government, in its brief before the Court of Appeals, too quickly makes the jump from words to actions and argues that the Local Board acted on the basis of petitioner's actions, not on his written protest. Government Brief, at p. 9. We disagree. The Local Board acted on the basis of petitioner's words stated in the course of political protest, not upon conduct. When one is intimately concerned about and personally involved in a controversial and vital national issue, it is too much to require that the expression of one's views avoid intemperate or ill-advised statements. *Cf. Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting).

In *Bond v. Floyd*, 385 U.S. 116 (1966), the court held that a State legislature could not constitutionally exclude a duly elected representative because of his statements criticizing Government policy in Vietnam and the operation of the Selective Service System. Bond had stated that he supported those who resisted the draft and that

he admired those who burned their draft cards. But he had not incited others to violate Selective Service laws. In the instant case petitioner expressed opposition to the war and the draft, giving the reasons for his opposition, but he also did not incite other to violate Selective Service laws, as does one who publicly burns his draft card.

The danger in permitting a Local Board to punish a Selective Service registrant for statements he makes in a protest letter to his Board is evident from the record. Petitioner *said* he had destroyed his "draft card," yet the Local Board noted in its records that petitioner had destroyed his "Registration Certificate."[1] How did the Board know he had not destroyed his Notice of Classification, if in fact he had destroyed any card at all? Further, on February 23, 1966, Major Henry Carlson of petitioner's Local Board sent a message by phone to Local Board No. 13 in Seattle, Washington, that "delinquent registrant has been the sort who tore up his draft card and has been causing trouble. . . ."[2] Solely from the *statements* in petitioner's protest letter, the Board concluded that Wills had destroyed his Registration Certificate and that he was a troublemaker, and thereupon acted to punish him.

We submit that the Board's action in punishing petitioner for pure speech unconstitutionally infringed his First Amendment rights, and that the delinquency declaration and subsequent induction order were therefore invalid. The court has granted certiorari in *Oestereich v. Local Board No.* 11, 36 U.S.L.W. 3437 (1968), to con-

1. Selective Service System File, Russel Milton Wills, p. 29.

2. Selective Service System File, Russel Milton Wills, p. 53.

sider whether the act of turning one's draft card into his Local Board is a constitutionally protected act of symbolic speech. Clearly, if the court holds that it is, then the action of Local Board No. 47 in the instant case would be *a fortiori* violative of petitioner's First Amendment rights, since petitioner did not go so far as to turn in his card but merely *said* in a protest letter to the Board that he was no longer in possession of his draft card. But regardless of the disposition in *Oestereich*, we urge the court to grant certiorari in the instant case to consider the further question of the limitation that can constitutionally be placed on the expression of views in a letter from a Selective Service registrant to his Local Board.

II

A question is presented as to whether the action of Local Board No. 47 in declaring petitioner a delinquent, classifying him I-A, and ordering him to report for induction, immediately after the Board had received a letter of protest from petitioner, violated petitioner's First Amendment right to petition the Government for a redress of grievances. This is a question which was not raised in the petition for certiorari, and is of a substantial nature.

Local Board No. 47 is a duly accredited agency of the United States Government which, although not empowered to redress petitioner's grievances, is entitled to all available information, particularly that which might affect petitioner's classification. In his October 19 letter to the Local Board, petitioner stated his opposition to the Vietnam war, informed the Board that he could no longer conscientiously cooperate with the Selective Service Sys-

tem, and gave his reasons therefor. The response of the Local Board in declaring petitioner delinquent, reclassifying him I-A and ordering him to report for induction violated petitioner's First Amendment right to petition a duly accredited representative of the United States Government for redress of grievances. See *Bridges v. California*, 314 U.S. 252 (1941).

In *Adderley v. Florida*, 385 U.S. 39 (1966), a strong dissent by four Justices viewed a civil rights protest at a county jail as within the right to petition the Government for a redress of grievances, and therefore not punishable under a state trespass statute. They found the county jail to be "an obvious center for protest" when it housed prisoners who many thought were unjustly held. The dissenters stated that:

> The right to petition for the redress of grievances . . . is not confined to appearing before the local city council, or writing letters to the President or Governor or Mayor. See *N.A.A.C.P. v. Button* [citation omitted]. Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly. Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable. . . . *Adderley v. Florida, supra*, 385 U.S. at 49-51.

The majority narrowly distinguished the case from *Edwards v. South Carolina*, 372 U.S. 229 (1963), on the ground that a jail is a government building to which

the public is denied access, whereas the State Capitol is a government building open to the public.

The entire *Adderley* court, therefore, impliedly held that a peaceful demonstration at a government building to which the public is normally granted access is within the right of the people to petition their Government for redress of grievances.

A Selective Service Local Board is a government facility to which the public has access. All males are required to appear personally at their Local Boards to register. 32 C.F.R. §1611.1. Registrants may go to a Local Board at any time to confer with Selective Service officials. See 32 C.F.R. §1604.41. The Local Board, as the agency of the Government which makes the decisions affecting registrants and with which registrants must deal, is an "obvious center for protest" against the peacetime draft and the Vietnam war. The Court of Appeals for the Second Circuit recently held that a peaceful demonstration against the Vietnam war conducted outside a Local Board office, and thus not significantly obstructing its operation, was lawful and within First Amendment protection. *Wolff v. Selective Service Local Board No. 16*, 372 F.2d 817 (C.A.2d Cir. 1967). If petitioner could have petitioned by demonstration at his Local Board, then he can petition that Board by letter.

Petitioner is a married full-time graduate student in Philosophy who controls no news media, and who lacks the assets to "advertise in newspapers or circulate elaborate pamphlets." Conventional methods of petitioning have proven unrewarding to students such as petitioner. Letters to Congress and the White House have not produced redress. Indeed, Congress has not only turned deaf

ears to the petitions of war dissenters; it has passed laws to the contrary.[3] In view of the October 26, 1967, letter[4] from the Selective Service Director, it is unrealistic to assume that petitions to the Director would have produced the redress sought by petitioner and the thousands of students like him. The plain fact is that "the overwhelming preponderance of those who object to the war are people who have no method of propagating their views on a widespread basis." Velvel, *Freedom of Speech and the Draft Card Burning Cases,* 16 Kansas L. Rev. 149, 152 (1968).

Petitioner has chosen an entirely peaceful method of petitioning the Government, a method which neither incites lawlessness on the part of others nor obstructs the operation of the Selective Service System. In a line of cases, this court broadened the constitutional right of Negroes to petition the Government for redress of their grievances at a time of frustration and disillusionment in the civil rights movement. *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963); *Edwards v. South Carolina,* 372 U.S. 229 (1963); *Adderley v. Florida,* 385 U.S. 39 (1966). We urge that logic and justice compel a similar extension of that right for draft-eligible dissenters in the antiwar movement, and that this is an emminently appropriate case for the court to make that extension. Punishment of orderly and civilized protests, such as a written petition to a Local Board, increases the forces of frustration and disruption which the peacetime draft and the Vietnam war generate in young men in the United States.

3. e.g., the Gulf of Tonkin Resolution, 78 Stat. 384 (1964), and the 1965 Amendment to the Universal Military Training and Service Act, 79 Stat. 586. (1965).

4. New York *Times,* November 8, 1967, p. 1, col. 1.

III

A question is presented as to whether Local Board No. 47's punitive use of the delinquency and reclassification procedures, following receipt of petitioner's protest letter, is authorized by statute or regulation. This is a question which was not raised in the petition for certiorari, and is a substantial nature.

Local Board No. 47 was empowered to declare petitioner delinquent only upon finding that he had "failed to perform any duty . . . required of him under the Selective Service law . ... ." 32 C.F.R. §1617.1. The unperformed duty must be an affirmative duty created by a specific administrative regulation. See *Wolff v. Selective Service Local Board No. 16*, 372 F.2d 817 (C.A. 2d Cir. 1967). Selective Service Regulation 1617.1 requires that a registrant retain his Registration Certificate in his possession at all times. 32 C.F.R. §1617.1.

The question here is whether the possession regulation requires the kind of "duty" which, if not performed, can be the basis for delinquency and reclassification.

Delinquency is analogous to civil contempt: it is designed to coerce compliance with procedures related to classification, not to punish past acts. The significance of delinquency status to the registrant is not that he is being punished for something he has done, but that unless he complies with the rules designed to enable the Local Board to ensure proper classification, he will become available for immediate induction. Indeed, the delinquency regulations provide that last minute compliance will expunge delinquency and stave off imminent induction. 32 C.F.R. §1642.14 (b). The "Delinquency Notice" itself

requests the registrant to contact his Local Board immediately—for the purpose of curing his alleged default. The delinquency procedure, therefore, is the device by which the Local Board can secure from uninformative registrants information that is relevant to classification, not a device by which the Board can *punish* registrants.

Possession by a registrant of his registration certificate is in no way related to the ability of a Local Board to perform its classification responsibilities. A number of regulations empower a Local Board to secure the information it requires for classification purposes. See, for example, Regulations 1641.7(a) (requiring every registrant to keep his Local Board currently informed); 1641.7(b) (requiring a registrant to notify his Board within 10 days of any change in circumstances); 1622.1(c) (providing for the sending of a Classification Questionnaire to any registrant); and 1625.1(c) (permitting Local Boards to obtain information concerning registrant from employers, police and other sources). The court has recently noted that possession of Selective Service certificates aids communication between registrants and Local Boards. *United States v. O'Brien*, 36 U.S.L.W. 4469 (1968). But the duty of the registrant is to keep his Local Board informed of all circumstances affecting his classification, and this duty must be performed whether or not the registrant carries his card. It is this duty that is integral to the relationship between the registrant and the Local Board, not the possession requirement.

It follows that to use reclassification and delinquency procedures as a sanction to enforce the possession requirement is to use these procedures as punishment, not to coerce compliance. The responsibility of Local Boards

is to classify young men and to order their induction on the basis of the classifications, not to punish registrants 32 C.F.R. § 1622.1(b). Acts not integral to the classification process, including willful non-possession of Selective Service certificates, may be crimes under the Act. 50 U.S.C. App. §462(b)(6). As such, they should be punished by prosecution in a criminal trial with proper procedural safeguards, not summarily by a Local Board acting pursuant to delinquency procedures.

The important questions of the nature and validity of the possession requirement have not yet been decided. In *United States v. Kime*, 188 F.2d 677 (C.A. 7th Cir. 1951), the constitutionality of the possession regulation was affirmed, but only as part of a holding that the entire conscription statute was constitutional. In *United States v. O'Brien*, 36 U.S.L.W. 4469 (1968), the majority of the court noted that "we are not concerned here with the nonpossession regulations . . . ." 36 U.S.L.W. at page 4473. The issue is raised in *Oestereich v. Selective Service Local Board No. 11*, No. 1246, October Term, 1967, for which certiorari has been granted. 36 U.S.L.W. 3437 (1968). But in *Oestereich*, the registrant actually returned his draft card to his Local Board. In the instant case, petitioner merely stated in a protest letter to his Local Board that he was not in possession of his draft card and would refuse to possess such a card in the future.

IV

A question is presented as to whether the delinquency regulations, if they can be used to punish a registrant who writes a letter to his Local Board protesting the Vietnam war and the peacetime draft, are unconstitutionally vague and overbroad. This is a question which was not

raised in the petition for certiorari, and is of a substantial nature.

Regulation 1642.4(a) authorizes a declaration of delinquency (and consequent I-A classification and priority induction. 32 C.F.R. §§1642.12, 1642.13) of a registrant who "has failed to perform any duty or duties required of him under the Selective Service law. . . ." 32 C.F.R. §1642.4(a). As construed in this case by Local Board No. 47, the regulation can be applied to punish a registrant for writing a protest letter. Such a construction of the regulation is productive of great uncertainty, since registrants will not know, in communications with their Local Boards, what expression is permitted and what will result in a delinquency classification. The uncertainty regarding use of the delinquency procedures has been further compounded by the October 26, 1967, letter from the Director of the Selective Service, in which General Hershey construes "duty" to include the duty not to violate the Selective Service Act in its entirety, as well as its "related processes," or to perform acts "under unfortunate influences of misdirected emotions. . . ."[5]

A regulation which can be construed so broadly con-

5. New York *Times*, November 8, 1967, p. 1, col. 1, which provides in part that:

> . . . any action that violates the military service act or the regulations, or the *related processes* cannot be in the national interest.
>
> It follows that those who violate them [including the related processes] should be denied deferment in the national interest. It also follows that *illegal activity* which interferes with recruiting or causes refusal of duty in the military or naval forces could not by any stretch of the imagination be construed as being in support of the national interest . . .
>
> It is to be hoped that misguided registrants will recognize the long-range significance of accepting their obligations now, rather than hereafter regretting their actions performed under unfortunate influences of misdirected emotions . . . (emphasis added).

travenes not only the general rule against vague statutes, *Baggett v. Bullitt*, 377 U.S. 360 (1964), but also the rule in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), which condemns statutes that are so broad in their sweep as to impose an intolerable restraint or have a "chilling" effect on the exercise of free speech. If Selective Service registrants can be punished by the delinquency procedures, as petitioner was, for writing a protest letter to a Local Board, then still another means of protest has been effectively chilled. Yet this Court has recently held that debate on public issues, particularly issues as important as the peacetime draft and the Vietnam war, should be "uninhibited, robust and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

At present the means by which young men such as petitioner can register their protest are narrowly limited. Few registrants, most of whom are students, control news media or can afford to advertise. Congress has not responded to letters or peaceful picketing. Draft card burning is punishable as a felony, as is intentional surrender of a draft card. 50 U.S.C. App. §462(b), as amended, 79 Stat. 586. Petitioner in the instant case has chosen an entirely peaceful means of expressing his protest, and if he can be punished by the delinquency procedures for that expression, then those procedures are impermissibly vague and overbroad.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

We certify that the within and foregoing Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to substantial grounds available to petitioner although not previously presented.

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